

Convention on the Elimination of all Forms Racial Discrimination (CERD)

Shadow Report 2008

**Submitted to the 72nd Session
Committee on the Elimination of Racial
Discrimination**

18th February- 7th March 2008

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This excerpt from the full Shadow Report contains the report's section on Haiti. The full report is available on the US Human Rights Network's website, at:

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U.S. VIOLATIONS OF ITS OBLIGATIONS UNDER THE CONVENTION VIS-À-VIS ITS TREATMENT OF HAITIAN MIGRANTS*

I. DISCRIMINATION AGAINST HAITIAN ASYLUM-SEEKERS

A. Introduction

The United States has a long history of targeting Haitian migrants in its immigration policy and practice, in a wide range of issues including detention and removal procedures, legislation concerning status adjustment and naturalization for various groups of immigrants, and the disparate application of temporary protections for refugees. The racial discrimination against Haitian refugees occurs through implementation of policies specifically targeting Haitians, neutral policies that leave too much discretion to immigration officials and allow the possibility of racially-based decisions, and preferential treatment for other nationality groups.

The United States has failed to fulfill its obligations under CERD to identify racially discriminatory practices and amend or nullify laws which have a racially discriminatory impact. Rather, it has increased its targeting of Haitians with stricter immigration policies in recent years, often under the asserted justification of homeland security concerns.

Historical background

Haiti was the second country in the Americas (after the United States) to declare independence from its colonizers, making it the first black republic of the modern world. Yet the Haitian Revolution of 1804 did not create a democratic political culture. On the contrary, “independent” Haiti suffered for nearly two centuries under repressive political regimes that were dominated by elite minorities who “rejected and ostracized the ... majority” and “coopted the state and used it as the key mechanism of control and rejection.”¹ As Michel Rolph-Trouillot described in 1990, “the Haitian state is predatory; it has always operated against the nation it claims to represent.”² Haiti is also the poorest

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¹ Irwin Stotsky, *Silencing the Guns in Haiti*, Chicago, University of Chicago Press, 1997, p. 24.

² Michel Rolph-Trouillot, *Haiti, State Against Nation: The Origins and Legacy of Duvalierism*, New York, Monthly Review Press, 1990; *discussed in* Stotsky, *Silencing the Guns in Haiti*, p. 24. Note that Rolph-Trouillot’s description refers to pre-1990 Haiti. In December 1990, the Haitian people elected Jean-Bertrand Aristide to the office of president in what international observers hailed as a fair and free election. This event marked the first time in nearly two hundred years of Haitian history that the Haitian state came to represent the will of the Haitian people. Democracy was short-lived, however. On September 30, 1991, Aristide was overthrown in a violent military coup and forced to flee

nation in the Western Hemisphere. United States financial and military support for Haiti's elite political regimes throughout the twentieth century only exacerbated the inequities and repression launched upon the Haitian people.

The first Haitian "boatpeople" claiming persecution in their country arrived in the United States in September 1963. All twenty-five refugees in the group were fleeing Haiti's ruthless, United States-supported dictator, François ("Papa Doc") Duvalier. Perhaps unsurprisingly, all were denied political asylum and deported. "In retrospect," immigrants' rights advocate Cheryl Little writes, "this signaled the wave of rejection that was to come." Indeed, Little argues, beginning with that first rejection of Haitian refugees in 1963, "[t]he fundamental principles of refugee protection have been abandoned time and again in favor of returning Haitians to a country where its people are routinely victimized."³

While Haitian refugees continued to make the perilous journey by sea to South Florida throughout the 1960s and 1970s, the largest waves arrived on United States shores in the 1980s. United States law and policy toward these refugees was largely influenced by Haiti's strategic location near Cuba, United States support for the anti-communist Duvalier regime, and a fear of the domestic consequences of failing to stem the flow of refugees. Professor Carlos Ortiz Miranda has written that throughout the 1980s and the first half of the 1990s, "the United States domestic and foreign policy regarding Haitian boatpeople and refugees ... had three objectives: (1) to exclude, detain, and restrict the use of parole for Haitians physically present in the United States, (2) to interdict Haitians on the high seas, and (3) to process Haitian refugees in their own country."⁴ Contemporary United States policy retains the first two objectives.⁵ Particularly after September 11, 2001, increasingly harsh measures have been used to implement them.⁶

B. Interdiction – Migration flows

1. Interdiction

Haiti. After three years of forced exile, Aristide triumphantly returned to power on October 15, 1994, with the assistance of the United States military.

³ Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. Sch. J. Hum. Rts. 269, 270 (1993); see also Cheryl Little, *Intergroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. Miami. L. Rev. 717, 717 (1998).

⁴ Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refuges, Immigration, and Foreign Policy*, 32 San Diego L. Rev. 673, 679 (1995). This paper will focus on the first objective – exclusion, detention, removal, and parole – and will briefly consider the second objective – interdiction.

⁵ For a discussion of the current Bush administration's rejection of in-country refugee processing, see Women's Commission for Refugee Women and Children, *Refugee Policy Adrift* at 33.

⁶ It is important to note that while the United States government termed Haitian refugees fleeing the repressive, United States-supported Duvalier regime in the 1980s "economic immigrants," and thus denied the vast majority political asylum, almost three times more Haitians were deemed political refugees under the democratic government of President Jean Bertrand Aristide in the early and mid 1990s "than during an entire decade marked by human rights abuses and tyranny." This was so despite a dramatic drop in the number of refugees attempting to reach the United States during Aristide's term. Little, *Intergroup Coalitions and Immigration Politics* at 722.

The longstanding U.S. practice of interdiction and repatriation of Haitian migrants violates Article 2 of CERD, and Subsection VI of the Committee's General Recommendation No. 30.

Interdiction is the procedure of intercepting vessels at sea and returning vessels and their passengers to the country from which they came, when there is reason to believe there is an offense being committed against U.S. immigration laws.⁷ By interdicting migrants at sea, refugees are prevented from reaching U.S. soil and gaining the right to asylum proceedings.

The United States has a long history of using interdiction to prevent migration by Haitian refugees. On September 23, 1981, the United States and Haiti entered an agreement by which the Haitian government agreed not to punish repatriated citizens for their illegal departure.⁸ After receiving this assurance from the Haitian government, President Reagan issued Executive Order 12324 on September 29, providing procedures for the Coast Guard to intercept and interdict vessels at sea. While the Executive Order itself does not specifically mention Haitians, an INS Fact Sheet acknowledges that the authorized program was initially known as the Haitian Migrant Interdiction Operation, and only later changed to the Alien Migrant Interdiction Operation to reflect the fact that some of the interdicted migrants were not Haitian.⁹

The policy became even more restrictive under Executive Order 12807 (known as the Kennebunkport Order), issued on May 24, 1992, which changed refugee determinations from a mandatory to a discretionary procedure. Whereas Exec. Order 12324 had provided that under the interdiction procedures "no person who is a refugee will be returned without his consent," Exec. Order 12807 stated that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."

The discretion introduced into the refugee screening process was again a change that would affect Haitians negatively. As Second Circuit recognized: "Although the Kennebunkport Order did not specifically mention Haiti, the next day, when the order was released to the national news media, it was accompanied by a statement from the White House Press Secretary, which noted that the President had 'issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti.'"¹⁰

Currently, migrants who "indicate" a fear of return are given a shipboard pre-screening interview, but the policy followed by the Coast Guard is to refrain from advising Haitians

⁷ Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

⁸ U.S.-Haiti, Aug. 1, 1981, 33 U.S.T. 3559.

⁹ "This Month in Immigration History: November 1991," <http://149.101.23.2/graphics/aboutus/History/nov91.htm>

¹⁰ Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1353 (2d Cir. 1992), rev'd, 509 U.S. 155 (1993).

migrants of the right to request asylum. Even under the current policy very few Haitians are given pre-screening interviews, as few meet what has become known as the “shout test”—only those migrants who wave their hands, jump up and down, and shout loudly are deemed to have “indicated” their fear of return.¹¹

In contrast, when Cuban or Chinese migrants are interdicted, U.S. authorities take affirmative steps of identifying possible asylum seekers among the migrants, by making an announcement in Spanish and by distributing a questionnaire in Chinese. This procedure stands out against the situation of Haitian migrants, who are not offered any information and do not always have access to an interpreter.¹² (Prior to 1995 and the implementation of a policy commonly referred to as “Wet Foot, Dry Foot,” U.S. immigration officials encountering Cuban migrants at sea did not interdict them. Although interdiction at sea now applies to Cubans as well as other migrant groups, Cubans who reach land are generally paroled into the United States¹³, thus the distinction between “wet foot” and “dry foot,” and receive other procedural benefits, as described in the sections on expedited removal and parole below. Even in the interdiction process, there is clearly disparate treatment between migrant groups, as Haitians are offered no information or interpretation services, while Cubans and Chinese migrants are made aware of the possibility of applying for asylum.)

2. Analysis

The longstanding policy of interdicting Haitian migrants, and their disparate treatment as compared to migrants from other countries such as Cuba or China, violates the United States’ obligation under Article 2 of CERD to nullify laws and regulations that create or perpetuate racial discrimination, and to end racial discrimination by any persons, group, or organization.¹⁴ The perpetuation of policies directed against Haitian migrants are also an example of the United States’ failure to follow through with the Committee’s 2001 recommendation to undertake “necessary measures to ensure the consistent application of the provisions of the Convention at all levels of government.”¹⁵

The disparate treatment of Haitian refugees also violates the principle embodied in General Comment No. 30 that state parties should “ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race,

¹¹ Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT’L J. REFUGEE L. 677 (2006).

¹² Thomas J. White Center on Law & Government, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (2001).

¹³ *The Cuban Adjustment Act of 1966: ?Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 Harv. L. Rev. 902, 907 (2001).

¹⁴ Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c)-(d) Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); 660 U.N.T.S. 195, 212 [hereinafter Convention].

¹⁵ Concl.Obsv., para. 11

color or ethnic or national origin.”¹⁶ The Committee has repeatedly expressed concern when countries exhibit hostility towards a particular group of migrants.¹⁷

Finally, the lesser protections provided to Haitian migrants also contravene the provisions of General Comment No. 30 requiring state parties to ensure that non-citizens are not subject to collective expulsion, or returned to countries or territories where they are at risk of being subjected to human rights abuses.¹⁸

3. Recommendations

- The United States should afford interdicted Haitians and interdicted migrants of all nationality groups equal access to translation services and information about the right to seek asylum.
- The United States should provide screenings for all interdicted Haitians and other interdicted migrants to determine whether they have a credible fear of return to their home country.

C. Processing, Inside the system

1. Expedited removal

The “expedited removal” system in U.S. immigration law further limits Haitian refugees’ access to asylum proceedings, and violates CERD Article 2 and General Recommendation No. 30 Subsection VI.

The expedited removal system was created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as a measure to deal with the backlog of asylum cases and to stem the flow of illegal immigration.¹⁹ Any arriving alien who is found with an invalid or missing visa or other travel documents is placed into the expedited removal system, which means immediate deportation unless the alien expresses fear of persecution or intent to apply for asylum.²⁰

¹⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination against Non-Citizens*, ¶ 25, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005) [hereinafter General Rec. No. 30].

¹⁷ CERD expressed concern over Botswana’s growing hostility toward Zimbabwean immigrants. *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention Concluding Observations of the Committee on the Elimination of Racial Discrimination, Botswana*, ¶ 8, U.N. Doc. CERD/C/BWA/CO/16 (April 4, 2006). CERD also expressed concern over Ukraine’s inequitable treatment of Roma. *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ukraine*, ¶ 12, U.N. Doc. CERD/C/UKR/CO/18 (Feb. 8, 2007).

¹⁸ General Rec. No. 30, para. 26-27

¹⁹ Erin M. O’Callaghan, *Expedited Removal and Discrimination in the Asylum Process: The Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1769 (2002).

²⁰ 8 U.S.C.A. § 1225(b)(1)(A)(i) (1996).

Under the general asylum provisions of the Immigration and Nationality Act, immigrants have one year after their arrival in the United States to apply for asylum.²¹ Adjudication of the asylum application is completed within 180 days of the application date. Claimants who wish to appeal a decision have 30 days after an asylum decision or completion of removal proceedings, whichever is later to file an appeal.²²

By contrast, an alien placed in expedited removal proceedings who expresses this fear or intent is then referred to an interview with an asylum officer, and must prove that he has a “credible fear of persecution” to be given any further consideration for asylum application.²³ If the officer makes a negative determination of credible fear, the alien can request a review of the decision, but this review must take place within seven days of the interview.²⁴ IIRIRA provides that an asylum-seeker can consult anyone “prior to the interview or any review thereof,” but that such consultation must come at no expense to the government and cannot “unreasonably delay” the process.²⁵ The extremely compressed time frame adversely affects migrants’ ability to find counsel to represent them.

The harm to asylum-seekers lies in the great discretion left to the individual asylum officer conducting the interview coupled with the very limited availability of judicial review. The determination of “credible fear” is made by “taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer.”²⁶ This loose standard not only allows the possibility of individual racial prejudices to influence the process, but also means that an alien’s claim depends on what the individual officer happens to know about conditions in the alien’s country of origin. Commentators point out that the risk posed by reliance on an individual officer’s knowledge of various foreign countries is heightened when the United States does not acknowledge a country’s human rights abuses²⁷, as is the case in the United States government’s characterization of Haitians as economic migrants rather than political refugees.

The U.S. government further extended the application of expedited removal following the arrival of a boatload of 235 Haitians in Florida on October 29, 2002. The INS issued a notice on November 13, 2002 stating that aliens who are not admitted or paroled and who have not been continuously present in the U.S. for the two-year period prior to the determination of inadmissibility will be placed in expedited removal proceedings.²⁸

This fast-tracking for deportation of Haitian migrants stands in stark contrast to the special treatment afforded to Cuban migrants, who generally face a much lower procedural burden and are able to circumvent the asylum procedural burden altogether.

²¹ U.S.C.A. § 1158(a)(2)(B)

²² U.S.C.A. § 1158(d)(5)(A)(iii)-(iv)

²³ 8 U.S.C.A. § 1225(b)(1)(B)(ii) (1996).

²⁴ 8 U.S.C.A. § 1225(b)(1)(B)(iii) (1996).

²⁵ 8 U.S.C.A. § 1225(b)(1)(B)(iv) (1996)

²⁶ 8 U.S.C.A. § 1225(b)(1)(B)(v) (1996).

²⁷ O’Callaghan, *supra* note 11, at 1755.

²⁸ INS Order No. 2243-02, 67 Fed. Reg. 68,924 (Nov. 13, 2002).

The Cuban Adjustment Act of 1966 gives the Attorney General discretion to adjust the status of any alien who has been inspected and admitted or paroled into the United States to that of “alien lawfully admitted for permanent residence.”²⁹ Since Cuban migrants who arrive in the U.S. are generally paroled, the effect of the CAA is to fast-track Cubans toward permanent residency.³⁰

2. Denial of parole and implementation of mandatory detention

The United States over the past several years has instituted increasingly strict detention policies for asylum-seekers, and Haitians in particular, violating CERD Articles 2 and 5, and General Recommendation No. 30 Subsections V and VI.

The decision of whether to detain or parole asylum-seekers while their applications are pending is another area left to the discretion of immigration officials. However, while paroling individuals while they await asylum decisions was previously the standard, the U.S. has increasingly restricted parole with mandatory detention measures that first targeted Haitians, then were extended to all other migrant groups except Cubans.

On December 3, 2001, the Coast Guard rescued approximately 167 Haitian migrants from an overcrowded sailboat off of the south coast of Florida. None of the migrants had any travel documents with them, and thus were placed into expedited removal proceedings. However, all of the migrants were given “credible fear” interviews, and 165 of them passed the interview and were thus given notices to appear for full non-expedited removal proceedings, which would include the opportunity to apply for asylum.

While there was a general presumption of paroling migrants in non-expedited removal proceedings, the INS changed its policies with respect to this group of Haitian migrants.³¹ INS Acting Deputy Commissioner Michael Becraft instructed the Miami district office that no undocumented Haitian should be released without the approval of INS Headquarters.³²

This discriminatory policy toward Haitians met with much criticism.³³ However, instead of ending this inhuman treatment of Haitian asylum-seekers, the Bush Administration sought to ensure “equal treatment” by extending the mandatory detention policy to all asylum-seekers, with the exception of Cubans.³⁴ The Bush Administration’s actions do indicate that the government recognized a problem, but its chosen course of action was the wrong response, and still does not eliminate the problem of racial discrimination since

²⁹ 8. U.S.C. § 1255 (a)

³⁰ *The Cuban Adjustment Act of 1966: ?Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 Harv. L. Rev. 902, 907 (2001).

³¹ *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002)

³² *Id.*

³³ Michael Rowan, *The Latest Chapter in the Saga of a Spiritless Law: Detaining Haitian Asylum Seekers as a Violation of the Spirit and the Letter of International Law*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 371 (2003).

³⁴ INS Order No. 2243-02, *supra* note 17.

Cuban migrants are still given preferential treatment and not subjected to the mandatory detention policies.

Even after this “equal treatment” of extending mandatory detention to all asylum-seekers except Cubans, the U.S. government again targeted Haitian migrants in 2003 when the Attorney General instituted a policy of denying release on bond to Haitian migrants in asylum proceedings.³⁵ David Joseph was a teenager who arrived with the boatload of Haitian migrants on October 29, 2002. Having no travel documents, he was taken into custody by INS and placed in removal proceedings. David Joseph claimed asylum, and the immigration judge granted the application for release on bond.³⁶ After the INS unsuccessfully appealed the decision to the Board of Immigration Appeals (BIA), the Under Secretary for Border and Transportation Security referred the BIA’s decision to the Attorney General for review.³⁷

The Attorney General ruled that releasing respondent David Joseph or “similarly situated undocumented seagoing migrants” on bond would have negative consequences for national security and immigration policy.³⁸ The Attorney General ruled that the release of such aliens could encourage massive migrations from Haiti, which would divert Coast Guard and Department of Defense resources from their homeland security responsibilities. Furthermore, Haiti could be used in the future as a staging point for aliens from countries such as Pakistan to enter the U.S. Denial of parole was therefore necessary as a deterrent against mass migrations from Haiti.³⁹

Commentators point out that interdiction procedures only make up a small portion of the Coast Guard’s regular activities, and that the government provided no statistics on the number of third country nationals entering the U.S. via sea-going vessels from Haiti.⁴⁰ The argument is also flawed because any country can serve as a conduit for third country nationals to reach the U.S., as many of the September 11 hijackers arrived in the U.S. after extended stays in European countries.⁴¹ The fact that the third-country argument is being used only in conjunction with parole policies for Haitian migrants is further evidence of discriminatory treatment.

Haitian migrants who are placed in expedited removal are also subject to mandatory detention under those provisions, until a determination of credible fear of persecution has been made, or if no such fear is found, until the alien is removed.⁴²

Post 9-11 changes to asylum proceedings include expansion of detention authority, like the 2001 regulation that gave INS prosecutors, and now DHS, the power to suspend an

³⁵ Judy Amorosa, *Dissecting In re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed by Haitian Asylum Seekers*, 38 CORNELL INT’L L.J. 263 (2005).

³⁶ *Id.*

³⁷ *In re D-J-*, 23 I. & N. Dec. 572 (2003).

³⁸ *Id.* at 579.

³⁹ *Id.* at 580.

⁴⁰ Amorosa at 287.

⁴¹ *Id.*

⁴² 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV) (1996).

immigration judge's release order, simply by appealing the judge's decision.⁴³ The regulation provides that DHS' filing of a notice of intent to appeal the parole decision within one business day of the immigration court's order, in any case in which DHS has determined that the alien should not be released or has set a bond of \$10,000 or more, will automatically stay the immigration judge's authorization of release.⁴⁴ Commentators suggest that this procedure has been used frequently to prevent Haitian asylum-seekers from being released from detention.⁴⁵

3. Analysis

Expedited removal harms refugees by limiting the procedural protections normally afforded to asylum-seekers. The nature of violent political situations that give rise to refugee migrations means that fleeing refugees generally do not have any travel documents. The speed of the proceedings effectively denies aliens in expedited removal proceedings any access to counsel. The great discretion left to the individual asylum officer, and the reliance placed on his personal knowledge of a particular country's political situation means that certain aliens such as Haitians, whom the U.S. government characterizes as "economic migrants" can be disadvantaged in the process. The U.S. government's failure to address this gap violates Article 2(c) of CERD, which provides that state parties must review governmental policies and amend those which have the effect of creating or perpetuating racial discrimination. It also contravenes the principle stated in the Committee's previous recommendation that the U.S. take firm action to guarantee all persons equal treatment before tribunals and other organs administering justice, without distinction as to race, color, or national origin.⁴⁶ The scant protections given to refugees in expedited removal proceedings also violations the General Comment 30 principle that state parties must ensure that non-citizens are not removed to countries where they are at risk of being subject to serious human rights abuses.⁴⁷

The extension of expedited removal proceedings immediately following the arrival of a boatload of Haitian refugees in 2002 demonstrates the U.S. government's targeting of particular migrant groups in the restrictiveness of its immigration policies. Contrasted with the exceptions made for Cuban migrants under the Cuban Adjustment Act⁴⁸, the discriminatory application of expedited removal processes clearly violates the principles on expulsion and deportation elaborated in General Comment 30, that laws concerning deportation or other forms of removal "do not discriminate in purpose or effect among

⁴³ 8 C.F.R. § 1003.19(i)(2) (2000).

⁴⁴ *Id.*

⁴⁵ Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1367 (2005).

⁴⁶ Concl. Obsv., para. 16

⁴⁷ Gnl. Cmt. 30, para. 27

⁴⁸ Although the CAA has also been modified by what is commonly termed the "Wet Foot, Dry Foot" policy, so that Cubans intercepted at sea are now returned to Cuba, those who reach the U.S. are still generally paroled into the country and therefore benefit from the fast-track procedures provided by the CAA.

non-citizens on the basis of race, colour or ethnic or national origin,” and that non-citizens “are not subject to collective expulsion.”⁴⁹

In continuing expedited removal procedures and denial of parole for Haitians, as compared to the circumvention of asylum procedures for Cubans, the United States government has failed to implement the previous finding in the Committee’s concluding observations that the state should take effective measures to review and amend or nullify any regulations that create or perpetuate racial discrimination.⁵⁰ The disparate practices also violate the principle articulated by the Committee in General Comment 30 that laws concerning deportation or removal of non-citizens must not discriminate among non-citizens on the basis of race, color, or ethnic or national origin.⁵¹ The targeting of Haitians as a group for expedited removal also violates the principle in General Comment 30 that non-citizens should not be collective expulsion.⁵²

While Haitians are fast-tracked for deportation through expedited removal processes, Cuban migrants are afforded a fast track to permanent residency through the Cuban Adjustment Act. This disparity violates the principle found in General Comment 30 that states must “ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization.”⁵³

4. Recommendations

- The United States government should stop expedited removal processes that subject particular groups of migrants to collective expulsion, without due consideration of the political conditions they may face if returned to their home countries.
- The United States government should afford Haitians and other migrant groups equal opportunities with regard to access to naturalization and citizenship.
- The United States should discontinue mandatory detention practices for Haitians and all other asylum seekers who do not pose any flight risk or risk to the community.
- The Department of Homeland Security must stop abusing the discretionary authority given to it after September 11 to arbitrarily detain Haitian migrants, under the pretext of “national security.”

D. Immigration Law: The Haitian Refugee Immigration Fairness Act and Temporary Protective Status

⁴⁹ Gnl. Cmt. 30, para. 25-26

⁵⁰ Concl. Obsv., para. 14. *See also* CERD Article 2(1)(c)

⁵¹ Gnl. Cmt. 30, para. 25

⁵² *Id.*, para. 26

⁵³ *Id.*, para. 13

The Haitian Refugee Immigration Fairness Act, when compared to similar measures, as well as the U.S.'s failure to grant Haitians temporary protected status violates CERD Articles 1 and 2 and General Recommendation No. 30 Subsections II and IV.

1. HRIFA

The Haitian Refugee Immigration Fairness Act of 1998 (“HRIFA”) was enacted in October 1998 in response to the Nicaraguan Adjustment and Central American Relief Act’s (“NACARA”) failure to address the immigration status of Haitians. A coalition was able to secure passage of HRIFA as part of an omnibus bill for 1999. HRIFA allows certain nationals of Haiti to adjust their status to permanent residence.⁵⁴

HRIFA states that to be eligible for adjustment of status, a Haitian must have been present in the United States on December 31, 1995 and “a) filed for asylum before December 31, 1995, b) was paroled into the United States prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons deemed strictly in the public interest, or c) was a child as defined by the Immigration and Nationality Act at the time of arrival in the United States and on December 31, 1995 and who (i) arrived in the United States without parents in the United States and has remained without parents in the United States since such arrival, (ii) became orphaned subsequent to arrival in the United States, or (iii) was abandoned by parents or guardians prior to April 1, 1998 and has remained abandoned since that date.”⁵⁵ The applicant must also have been continuously present in the U.S. from December 31, 1995 to the time of filing.⁵⁶ Spouses, children, and unmarried sons and daughters are also eligible for adjustment of status with the principal applicant if they are physically present in US on date of filing.⁵⁷ The application for adjustment of status deadline was March 31, 2000. No extension was granted.⁵⁸

In 1997, NACARA provided adjustment of status benefits for certain Nicaraguan and Cuban nationals, and more limited relief from deportation for nationals of other countries.⁵⁹ HRIFA was proposed in an effort to provide equal treatment for Haitians. However, NACARA is substantially less restrictive than HRIFA. To be eligible for adjustment of status a national of Nicaragua or Cuba must have “been physically present in the United States for continuous period, beginning not later than December 1, 1995 and ending not earlier than the date the application for adjustment under such subsection is filed.”⁶⁰ NACARA and HRIFA also have identical provisions of the adjustment of status for derivative applicants.⁶¹ However, Nicaraguans and Cubans are not subject to

⁵⁴ Austin Fragoment, Jr. and Steven Bell, *Practicing Law Institute Immigration Fundamentals, A Guide to Law and Practice*, PLIREF-Immig 4:5, 4-49 (2007).

⁵⁵ Haitian Refugee and Immigration Fairness Act, Pub. L. No. 105-277, 112 Stat. 2681-538 1998.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* See also Fragoment and Bell, *supra* note 54 at 4-51.

⁵⁹ See also Fragoment and Bell, *supra* note 54 at 4-49.

⁶⁰ Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 1997.

⁶¹ *Id.*

the additional requirements imposed by HRIFA. While under HRIFA, Haitians must have either filed for asylum or been paroled into the United States prior to 1996 in order to adjust their status, under NACARA, Nicaraguan applicants only had to meet the “presence” requirement.

Furthermore, like HRIFA, NACARA’s filing deadline was March 31, 2000 for those filing under section 202 of NACARA (i.e. Cubans and Nicaraguans).⁶² However, NACARA was passed in 1997, while HRIFA was passed in 1998, leaving Haitians with less time to file adjustment of status applications.

In addition, the government’s response to HRIFA applications has been extremely slow, denying some Haitians of the benefits HRIFA sought to secure. For example, some children placed in removal proceedings have aged out of derivative eligibility due to years long government delays in processing their parents’ HRIFA applications. These children are therefore now deportable.

HRIFA improvement legislation to remedy the serious problems with HRIFA’s enforcement and gaps in the law itself has been introduced no less than five times in the United States Congress; it was included in the version of comprehensive immigration reform passed by the Senate in 2006 but has never been enacted into law.⁶³

2. *Temporary Protected Status*

The United States grants temporary protected status (“TPS”) to foreign nationals from certain countries who face serious danger from natural disaster, draught, epidemic, or civil unrest if deported to their home countries.⁶⁴ The President of the U.S. determines which country’s nationals should be granted TPS on a yearly basis.⁶⁵ Individuals that are apply and are eligible for TPS are allowed to stay in the U.S. for up to 18 months, or more, if TPS is extended. TPS is appropriate if “there exist extraordinary and temporary conditions in the foreign state”⁶⁶ (such as an earthquake, flood, draught, epidemic, or other environmental disaster or civil unrest) and “the foreign state is unable temporarily to handle the return of its nationals and the foreign state has affirmatively requested [TPS] designation.”⁶⁷ Granting TPS must also not be “contrary to the national interest of the US.”⁶⁸ TPS does not afford protection to people fleeing their country; it only covers persons already in the United States as of the initial grant date.

⁶² Id.

⁶³ Testimony of Marleine Bastien Before the US House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, May 22, 2007.

⁶⁴ Sarah Anchors, *Temporary Protected Status Making the Designation Process more Credible, Fair and Transparent*, 39 Ariz. St. L.J. 565, 566 (2007).

⁶⁵ INA § 244; 8 U.S.C. § 1254(a) (2000).

⁶⁶ INA § 244(b)(1)(B); 8 U.S.C. § 1254(b)(1)(B) (2000).

⁶⁷ Id.

⁶⁸ INA § 244(a)(b)(1)(C)(b); 8 U.S.C. § 1254(a)(b)(1)(C)(b) (2000).

Haiti clearly meets these country conditions and Haitians should be eligible for TPS. There exist “extraordinary and temporary conditions” in the Haiti that prevent nationals from returning safely.” In 1991, a military coup brought a campaign of brutality and arbitrary arrests. In 1994, armed rebels seized the largest city leading to human rights abuses. Since 2004, extrajudicial killings and violent protests have continued to exhibit civil unrest in Haiti.⁶⁹ The human rights conditions in Haiti have been categorized as “catastrophic.”⁷⁰ In addition, since 2004, massive flooding, tropical storm Jeanne, and Hurricanes Wilma, Ivan, and Dennis have brought economic, infrastructural, and institutional disasters to Haiti.⁷¹ Haiti continues to suffer critical housing, employment, health-care, and infrastructure deficiencies. Reconstruction is extremely incomplete.⁷² Haiti therefore meets the statutory requirements for TPS on both civil unrest and environmental disaster grounds - only one of which is needed.

Despite the conditions in Haiti, Haitians have not been granted TPS, although other nationalities, including Pakistanis, Lebanese, and Southeast Asians national following the Tsunami, have often been granted TPS.⁷³ In 2007, although TPS was renewed for Hondurans, Nicaraguans, and Salvadorans due to incomplete Hurricane recovery, Haiti’s similar situation due to natural disasters was not addressed and Haitians once again were passed over for temporary protected status.⁷⁴ Haitians consistent lobbying for TPS has yielded no results.⁷⁵

3. Analysis

The disparate treatment, under U.S. immigration law, of Haitian migrants as compared to migrants from countries with similar conditions at home, violates the United States’ obligation under Article 1 of CERD to not discriminate against any particular nationality in legal provisions concerning nationality and naturalization.⁷⁶ Section I, paragraph 1, of the Committee’s General Recommendation No. 30 reminded states of this obligation not to discriminate in official immigration laws.⁷⁷

U.S. immigration law’s clear discrimination against Haitians versus migrants from countries with similar conditions, violates the United States’ obligation under Article 2 of CERD not to engage in discrimination, not to sponsor discrimination and to nullify discriminatory laws.⁷⁸

⁶⁹ Anchors, *supra* note 63 at 575-76.

⁷⁰ Notes de Point de Presse de la MINUSTAH, United Nations, *Press Release*, Oct. 14, 2005.

⁷¹ Steven David Forester, *Letter to His Excellency Rene Gracia Preval, President of Haiti*.

⁷² *Id.*

⁷³ Anchors, *supra* note 54 at 574.

⁷⁴ Bastien, *supra* note 63.

⁷⁵ *Id.*

⁷⁶ Convention on the Elimination of All Forms of Racial Discrimination, art. 1(3) Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); 660 U.N.T.S. 195, 212.

⁷⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination against Non-Citizens*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005).

⁷⁸ Convention on the Elimination of All Forms of Racial Discrimination, art. 2(a), 2(b), 2(c) Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); 660 U.N.T.S. 195, 212.

The U.S.'s failure to grant TPS to Haitians, despite Haiti's clear qualifications with statutorily required country conditions, as well as the unfavorable disparities between HRIFA and NACARA violate the United States' obligations, as explained by the Committee's General Recommendation No. 30, to ensure that its immigration policies do not have the effect of discriminating against persons on the basis of race and to ensure that particular groups are not discriminated against with regard to access to citizenship and naturalization.⁷⁹

The US's policies concerning TPS and HRIFA are contrary to The Committee's finding that "thresholds for the entry and residence of non-citizens according to nationality may discriminate on the basis of nationality"⁸⁰ and therefore violate General Recommendation 30.

4. Recommendations

- The United States must review the conditions in Haiti and grant TPS to Haitians.
- The United States must pass HRIFA improvement measures, including an additional year for filing adjustment of status applications, a repeal of the provisions limiting adjustment of status only to children, paroles, and asylum seekers, as well as relief for those who children who have aged out of eligibility for adjustment of status, due to government delays in processing applications.

⁷⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination against Non-Citizens*, ¶ 9, 13 U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005)..

⁸⁰ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention Concluding Observations of the Committee on the Elimination of Racial Discrimination, Mongolia*, ¶ 13, U.N. Doc. CERD/C/MNG/CO/18 (Oct. 19, 2006).